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GTE Service Corporation
August 27, 1999

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF GTE

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COMMENTS OF GTE

GTE Service Corporation and its affiliated communications companies (collectively, "GTE")[1] respectfully submit their comments on the Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter.

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[1] These comments are filed on behalf of GTE's affiliated domestic telephone operating companies, GTE Wireless Incorporated, GTE Media Ventures, and GTE Communications Corporation, Long Distance Division. GTE's domestic telephone operating companies are: GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone

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I. INTRODUCTION AND SUMMARY

In a variety of capacities, GTE is providing a wide selection of telecommunications services in virtually every region of the country. In many of those markets, of course, it is operating as an incumbent LEC. In addition, GTE also has wireless operations in 17 states and long distance operations in all 50 states. In other markets, GTE is beginning operations as a CLEC. And in still other markets, GTE Media Ventures operates as a video provider in competition with the incumbent cable franchise. As a result, GTE's various companies operate under different regulatory classifications, each with its own unique set of rights and obligations. Consequently, GTE is responding to the NPRM as both an incumbent and as a new competitor. From this perspective, GTE believes that the Commission's NPRM raises important issues, implicating both the future of competition and the reasonable business expectations of all telecommunications carriers that serve multiple tenant units ("MTUs"), that require a balanced response.

On the one hand, ILECs have incurred substantial expense in serving MTUs as a carrier of last resort. This regulatory status has resulted in the establishment of various cost recovery requirements and divisions between a carrier's property and rights and those of the customer. On the other hand, new entrants need to be able to access MTU property to compete with existing providers. Some building owners have been

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Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc.

reluctant to permit additional parties to run wire in MTUs, and regulatory intervention would help alleviate this situation. Importantly, the Commission must preserve the ability of customers to select the carrier of their choice, even though a building owner may have contracted separately with another provider. In this context, the Commission should not over-regulate in this area, but rather should obey the 1996 Act's mandate to rely on marketplace forces wherever possible.[2] All of these principles require the Commission to take a balanced, market-based approach to intra-building wiring, with open access as the ultimate goal.

Nevertheless, there is a right way and a wrong way to adopt such neutral policies. A simple and straightforward approach would be to modify the Commission's existing wiring rules and apply them to all telecommunications carriers equally. This would ensure that competitors, building owners, and individual customers can obtain access to existing intra-building wiring, subject to an obligation to compensate the existing carrier for the costs of the wiring and the relocation of the current demarcation point, if necessary. In contrast, the Commission should not stretch to the breaking point unbundling theories under Section 251(c) or pole attachment theories under Section 224. These provisions simply do not effectively address the intra-building wiring in question.

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[2] *See Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 99-217, CC Docket No. 96-98, FCC 99-141, at ¶¶ 2-4 (rel. July 7, 1999) ("*NPRM*"). By *Order*, DA 99-1563 (rel. Aug. 6, 1999), the dates for filing comments and reply comments on the *NPRM* were extended until Aug. 27 and Sept. 27, respectively, while the filing dates for the *Notice of Inquiry* were extended to Oct. 12 and Dec. 13, 1999.

GTE believes that its proposed method – modification of the Commission's existing inside wiring rules and evenhanded application of those revised rules to all telecommunications carriers, as outlined herein – is the most effective, and least problematic, method of accomplishing the Commission's goals. Adopting such rules will promote competition and ensure customer choice, while avoiding administratively burdensome, legally questionable, and constitutionally suspect regulatory approaches.

II. A PROPERLY CRAFTED INTRA-BUILDING WIRE ACCESS RULE WOULD MOST EFFECTIVELY PROMOTE COMPETITIVE ACCESS IN ACCORDANCE WITH THE COMMISSION'S PROPOSED POLICY GOALS.

The Commission seeks comment on how its rules governing determination of the demarcation point in multiple unit premises impact competitive provider access, and whether any modification or clarification of those rules is appropriate to promote access.[3] The most direct – and expedient – approach to ensuring competitive access to MTUs is to revise the existing inside wire rules[4] in order to speed the relocation of the demarcation point to the minimum point of entry ("MPOE") in MTUs existing as of August 13, 1990.[5] The FCC should revise its rules in order to promote competition and to create clear, universally applicable regulations. Such rule changes, however, should ensure that existing carriers are adequately compensated for wiring and the costs of relocating the demarcation point.

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3 NPRM at ¶ 65.

4 The current inside wire rules can be found in Part 68 of the FCC's rules, 47 C.F.R. § 68.1 *et seq.*

5 *See* definition of "demarcation point," 47 C.F.R. § 68.3.

A. The Carrier Practice of Placing the Demarcation Point at the Minimum Point of Entry in New MTUs Has Proved Effective.

In its *Report and Order* adopted on June 8, 1990 in CC Docket No. 88-57, the Commission revised its demarcation point definition to allow carriers to "establish a reasonable and nondiscriminatory practice of placing the demarcation point at the minimum point of entry" when terminating the telephone network at the customer's premises in order to "best assure that the customer, whether he or she is the multiunit property owner or a unit occupant, will be able to install inside wiring and access carrier-installed inside wiring on his premises."[6] Section 68.3 defines "minimum point of entry" as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings. The telephone company's reasonable and nondiscriminatory standard operating practices shall determine which shall apply."[7]

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[6] *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules filed by the Electronic Industries Association*, 5 FCC Rcd 4686, 4693 (1990) (Report and Order and Further Notice of Proposed Rulemaking)("*Report and Order*"), *stay denied*, Order, 5 FCC Rcd 5228, (CCB 1990). The FCC also determined that, "[i]n the absence of a carrier practice of placing the demarcation point at the minimum point of entry, the multiunit premises owner may determine the location of the demarcation point or points." *Id.*

[7] 47 C.F.R. § 68.3. In 1997, the agency further clarified and amended its definition of "demarcation point". *See Review of Section 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules filed by the Electronic Industries Association,* 12 FCC Rcd 11897 (1997) (Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking) ("*Reconsideration Order*).

In adopting this definition, the FCC explained that the network integrity concerns which had provided the justification for allowing incumbent carriers vast discretion in determining where the demarcation point would be located were no longer present:

> location of the demarcation point by the carrier at a location far from where wiring enters the customer's premises is now an unreasonable practice in view of our determination on the present record that customers can without harm and without significant risk of accessing the protector directly access carrier-installed wiring. In other words, since permitting the customer to directly access carrier-installed wiring is without substantial risk of network harm, location of the demarcation point at a point which prevents access to such wiring is no longer justified.[8]

Thus, the Commission determined that the most effective method for ensuring competitive access to MTUs was to modify its rules to promote the relocation of the demarcation point to the MPOE.

However, the agency, recognizing the Herculean effort that would be required to migrate all existing MTUs to an MPOE demarcation point, refrained from applying its revised "demarcation point" definition to MTUs existing as of August 13, 1990: "Accordingly, as allowed under the present rule, the revised demarcation point [for existing MTUs] shall be determined in accordance with the carrier's reasonable and nondiscriminatory standard operating practices."[9] As a result, there are no FCC regulations currently in effect that promote the conversion of MTUs existing as of August 13, 1990 to an MPOE demarcation point.

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8 *Report and Order*, 5 FCC Rcd at 4692.

9 *Report and Order*, 5 FCC Rcd at 4692-93.

B. The Commission Should Amend its Inside Wire Access Rules To Allow The MPOE as The Demarcation Point for MTUs Existing as of August 13, 1990.

In the *NPRM*, the Commission seeks comment on "issues that bear specifically on the availability of facilities-based telecommunications competition to customers in" MTUs.[10] Instead of relying on novel legal theories such as unbundling under Section 251 or access to rights-of-way under Section 224, the Commission should simply revise its existing inside wire rules in order to expedite the relocation of the demarcation point to the MPOE for MTUs existing as of August 13, 1990 (*hereinafter* "preexisting MTUs").

In the *Report and Order* which revised the definition of "demarcation point," the FCC found that allowing carriers to establish a reasonable and nondiscriminatory practice of locating the point of access at the MPOE is the most effective means of allowing competitive access to inside wiring in MTUs. Since that order was released, experience has verified the agency's conclusions: MTUs affected by the Commission's revised demarcation point definition (*i.e.*, MTUs built after August 13, 1990) do not pose the same impediments to competitive access as preexisting MTUs, simply because the network termination point is more readily accessible by all telecommunications service providers. By adopting clear guidelines regarding a carrier's obligation to convert the demarcation point to the MPOE in preexisting MTUs, the Commission will achieve its goal in a manner that is less disruptive to customers and carriers, provides adequate compensation for existing providers, ensures that competitors have access to intra-

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[10] *NPRM* at ¶ 28.

building wiring, and guarantees that individual customers in MTUs are served by their provider of choice.

1. The Success of an MPOE-Based Demarcation Point Policy Depends Upon Clear Rules Regarding the Conversion of Preexisting MTUs to the MPOE.

The FCC has determined that Section 68.3(b)(1) does not authorize the automatic relocation of a preexisting MTU's demarcation point to the MPOE.[11] Accordingly, specific provisions must be adopted to address the various issues arising from the conversion to an MPOE-based demarcation point. Below is a description of GTE's proposed amendments to the FCC's existing inside wire rules which are designed to allow open access to MTUs in the most efficient – and least disruptive – manner possible.

Nondiscriminatory Application. The FCC should uniformly apply its revised policy to all telecommunications service providers. As the Commission found in the *Cable Home Wiring* proceeding, such a policy ensures that the MPOE-based demarcation point policy is consistently applied to all buildings regardless of the identity of the carrier involved, and that all customers under similar circumstances are treated equally.[12] If the MPOE-based policy does not apply equally to all carriers, then

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[11] *Reconsideration Order*, 12 FCC Rcd at 11914-15. Nor would such an approach be practical or warranted. First, an automatic revision would disrupt building owner and carrier expectations even in situations where no competitive use of the intra-building wiring is contemplated. Second, such a rule would not adequately address carrier compensation for the costs involved in moving the demarcation point.

[12] *See Telecommunications Services Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*,13 FCC Rcd 3659, 3708 (1997) (Report

(Continued...)

customers and building owners will be confronted with inequitable choices and benefits – an unsatisfactory result which would undermine the FCC's underlying goal of promoting the development of facilities-based local competition.

Relocation Criteria. The Commission should revise its rules to establish three scenarios as triggering events for a telecommunications service providers' obligation to relocate—with adequate compensation—the demarcation point to the MPOE in preexisting MTUs: (1) The building owner or customer requests that the physical location of the network termination be moved or changed; (2) The building owner or customer requires major additions, modifications, and/or rearrangements of network outside plant facilities; or (3) A telecommunications service provider requests use of another telecommunications service provider's intra-building wiring with the building owner's permission. Until one of these triggering events occurs, however, the carrier would not be required to relocate the demarcation point.

The guidelines proposed by GTE will expedite the growth of intra-building competition in two ways: (1) they minimize the degree of disruption that occurs within MTUs, as carriers will only be required to relocate the demarcation point when asked to do so by an MTU owner, a customer, or a new entrant; and (2) they clearly define MTU owner, customer and new entrant rights regarding demarcation point relocation.

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and Order and Second Further Notice of Proposed Rulemaking)(" *Telecommunications Services Inside Wiring*") ("We believe that applying these rules to all Commission licensees that are MVPDs would be in the public interest. The same competitive concerns described above exist regardless of whether a cable operator or some other video service provider initially installed a subscriber's or an MDU's inside wiring.").

Location of the Demarcation Point. In order to effectively promote intra-building facilities-based competition in MTUs, the FCC should adopt guidelines pertaining to the precise location of the demarcation point. Specifically, the agency should mandate that the demarcation may be located at one of the following locations: (1) where the wiring enters the building(s), usually in one of the following areas: basement, ground floor, or some other easily accessible location; (2) on the exterior or interior of the building; or (3) within twelve inches or as close as practicable to the first network protector and associated grounding location.

For continuous property such as campus arrangements, malls, and large resort developments, the demarcation point for new installations should generally be located at an appropriate main distribution terminal in a single building as determined by the telecommunications service provider, subject to negotiations with the campus owner. If the property owner desires additional demarcation points, the owner should in most cases be required to pay for the additional network facilities required to install any additional points.

In both new and existing multiunit locations, telecommunications service providers should be required to install their respective network facilities in an equipment space or closet in the basement or first floor of a building, or at another defined property point that is readily accessible. The telecommunications service provider should be responsible for the maintenance, repair, and service quality of the facilities up to the demarcation point.

Access and Accommodations. Competitive carriers must have access to the requisite space surrounding the wire in an MTU in order to adequately utilize it and

provide service to its tenants. Thus, in order to fully open up MTUs to facilities-based intra-building competition, all telecommunications service providers must have the direct access and accommodations needed to offer service.

"Necessary accommodations" should be defined as wall space, floor space, equipment closets, commercial power outlets, access to a ground electrode, and specialized environmental conditioning (*e.g.*, extra air conditioning capacity, fire suppression equipment, lightning protection, secure and lockable space) as required by code, practice, or procedure. Telecommunications company personnel should also have seven-day/twenty-four hour access to the space for repair and maintenance to ensure reliability and quality customer service. Building space requirements will vary based on the type of facility placed (*e.g.*, copper or derived channels), the number of tenants served, and the types of services provided.

Carrier Flexibility and Discretion. Given that no two MTUs are alike, carriers should be allowed a sufficient amount of discretion in applying the revised demarcation point policy. Although carriers should strive for equivalent treatment of their customers, strict adherence to a demarcation point policy without allowing flexibility for special circumstances could unnecessarily inconvenience customers and increase costs. Carriers should be allowed to exercise discretion as long as it does not involve unreasonable expense or delay. This is consistent with Section 68.3 of the Commission's rules, which allows demarcation points to be located "as close as practicable" to the MPOE. However, if material or unreasonable expense is required to meet special or unusual requirements, then the requesting entity should be made responsible for those costs.

2. Carriers Should Be Appropriately Compensated by the Cost Causer for Converting the Demarcation Point to the MPOE.

The Communications Act and the constitution both require that the incumbent LEC be compensated for the cost of relocating an existing demarcation point either by the building owner or the new entrant that seeks access. In order to ensure that the customers of one carrier do not subsidize customers of another carrier (or that carrier itself), the requesting entity – whether it be the MTU owner, MTU tenant(s), or a new entrant – should be responsible for compensating the carrier for expenses incurred in the migration to the MPOE. A related benefit of such a rule would be that it affords new entrants the ability to force relocation of the demarcation point – if they agree to pay the costs involved.

Consistent with the FCC's current policy, the existing carrier should be compensated at structural costs or through an "allowed use" option which would retain the capital portion of the inside wiring in the carrier's rate base until fully depreciated.[13] Under the "allowed use" option in an MPOE regime, the existing carrier will retain ownership of the installed wiring and the continuing ability to serve tenants, but control of the use of the wire on the property owner's side of the demarcation point would revert to the property owner. A new entrant would be capable of using the existing intra-building cable if suitable, or installing new wiring contingent upon the availability of

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[13] "Structural value" is the current value of the physical plant to the purchaser and is computed as the reproduction cost new, determined (or estimated) on the basis of current equipment, material, engineering and installation costs, less an allowance for physical or functional deterioration reflecting the age and condition of the plant as well as such other factors as inadequacy, obsolescence, etc.

adequate building space. The MTU's demarcation point will be readily accessible to new entrants, thereby effectively facilitating intra-building competition. Accordingly, there would be no need for reclassification of the installed wiring as a UNE.[14]

In addition, GTE believes that customers should have the right to order telecommunications services from their provider of choice, notwithstanding the fact that the building owner or another provider may own intra-building wiring. That right is hindered, however, if the carrier of choice has no means of using the existing wiring to provide service. In order to accommodate the customer's choice, the Commission should allow a carrier to use another's intra-building wiring to reach the customer, but should negotiate with the wiring owner as to the compensation. Whoever owns and/or controls the inside wiring in an MTU should be free to set a reasonable price for its use. The current robustly competitive market for inside wiring will serve as a "marketplace check" on these negotiations; accordingly, the Commission should leave it to private negotiations to determine the compensation amount.[15]

While this approach would effectively address the general issue of inter-carrier compensation through reliance on marketplace forces, it does not take into consideration the unique obligations of carriers of last resort. Given the potential that the price charged by the wiring owner may be too high, a carrier of last resort (COLR) should be afforded the opportunity to either: (1) refuse to serve the customer; or (2)

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[14] GTE opposes price regulation of intra-building wiring because such regulations would not be applied to *all* telecommunications service providers, only ILECs.

[15] In GTE's experience, prices charged for access to MTU intra-building wiring have to date been reasonable: on average, $2-3 per month.

pass through any intra-building wiring charges directly to the requesting customer. This will ensure that a COLR may not be forced into paying exorbitant rates if negotiations fail, and will protect all ratepayers from being saddled with additional costs arising from an obligation to serve all customers, including those to whom access is controlled by an exclusive service provider. This also would provide an incentive for the tenant, the most effective market force in this circumstance, to exert pressure on the building owner to change its compensation policy if the tenant cannot find a reasonable alternative to the existing provider. Accordingly, GTE vigorously opposes mandating that a COLR be forced to serve a customer if the COLR finds that the rate for use of the wiring to be unreasonable.

3. GTE's Proposed Modifications to the Commission's Inside Wiring Rules Will Promote Competition and Customer Choice.

The foregoing proposed modifications to the Commission's inside wiring rules for complex wiring are the most effective solution to ensuring nondiscriminatory access. GTE's approach has several distinct advantages. First, and foremost, it provides for prompt, consistent, and clear rights for all parties to access MTUs and/or individual customers in accordance with the dictates of competition and consumer choice. Second, GTE's approach is less disruptive to existing customers because the status quo would reign until a change in circumstances is required. Third, the proposal solves constitutional problems by providing adequate compensation for the owner of the wiring. Finally, the proposal also avoids the pitfalls of the Section 251 unbundling or

Section 224 approaches as outlined below. Therefore, the Commission should adopt the GTE proposal to modify the Commission's inside wiring rules.

4. The Commission's Treatment of Exclusive Contracts Must Address Competitive and Cost Recovery Concerns.

The Commission asks whether it should ban exclusive contracts between telecommunications carriers and building owners that give the contracting telecommunications carrier the exclusive right to access and wire the building for telecommunications services. The Commission asks whether such a ban would be an effective means of securing nondiscriminatory access to MTUs and whether the agency should only limit such a ban to particular situations, such as when a carrier has market power.[16]

There are essentially two types of exclusive contracts in the MTU telecommunications arena: exclusive telecommunications wiring contracts and exclusive telecommunications service contracts. Exclusive contracts for wiring and its corresponding installation and maintenance have been the subject of free market competition for years. Today there are many non- or lightly-regulated entities – such as shared tenant service providers, call aggregators, and competitive local exchange carriers – that compete for MTU wiring installation contracts. The costs of performing this work are recovered over a defined period of time, and early termination by the building owner generally results in imposition of a termination charge designed to

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[16] *NPRM* at ¶ 64.

assure full cost recovery for construction and other costs. Such agreements are private contractual matters that are beyond the scope of the transition to an MPOE regime. However, it is imperative that the exclusive telecommunications wiring owner make the use of such wiring available to all telecommunications service providers who may desire to serve the tenants of the MTU. The fees for use of the wiring, if any are charged, should be established on a non-discriminatory, market-based basis.[17]

As for exclusive telecommunications service contracts, these contracts make one carrier the sole telecommunications service provider for an MTU. GTE believes the creation of such captive populations of telecommunications service customers is unsound as a matter of public policy, irrespective of the regulatory status of the carrier, *i.e.*, dominant or non-dominant. Therefore GTE supports a policy that permits individual telecommunications customers in MTUs to select the carrier of their choice. Furthermore, in those cases where the "exclusive" telecommunications provider is also the exclusive inside wiring contract holder and an end user customer selects a competing carrier other than the holder of the "exclusive" contracts, the inside wiring contract holder must make available the necessary inside wire to the competing carrier. The competing carrier must provide reasonable, market-based compensation to the "exclusive" carrier to enable recovery of its sunk costs. The Commission should refrain from imposing detailed regulations governing such compensation in order to simplify the

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[17] When a building owner is also the owner of inside wiring, it is reasonable to assume that the costs of inside wiring are fully recovered from the rents paid by tenants, just as the costs of other common infrastructure (e.g., stairwells, elevators, water fountains, common areas) are recovered from rents; thus no inside wire charges would be necessary or appropriate.

business environment and to rely as much as possible on market forces, a clear goal of the 1996 Act.[18]

These rules must be applied on an even-handed basis to all carriers. New entrant telecommunications carriers have been signing exclusive contracts at enormous rates, locking up entire buildings and sealing off further competitive inroads that could be made by other carriers.[19] Public policy and competition are not served by giving particular industry players unique advantages not available to all. Similarly, all carriers' legitimate interests in reasonable cost recovery for sunk costs should be subject to an even-handed rule as well.[20]

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[18] *See* S. Rep. No. 104-230 at 1 (1996).

[19] *See, e.g.*, Teligent Press Release, *Teligent's New Smartwave DSL Offers Smaller Businesses A "Step Up From Dial-Up" – Bigger Bandwidth At An Affordable Price*, June 22, 1999 <http://teligent.policy.net/proactive/newsroom/> (visited Aug. 27, 1999) ("Teligent offers small and medium-sized companies a flat monthly bill for local and Internet services . . .. To qualify for the maximum discount, customers switch their existing service – local or Internet – and sign up . . . for a minimum of one year."); WinStar Press Release, *Winstar to Provide Boston Properties with Advanced Broadband Telecommunications Services*, July 8, 1999 <http://www.winstar.com/PressRelease/78_boston_properties.htm> (visited Aug. 27, 1999) ("WinStar gains access rights to more than 700 buildings in 2nd Qtr – new company record for a quarter . . .. We expect to acquire access rights to 8,000 buildings by year-end, making us by far the most widely available alternative and broadband network in the country . . .. WinStar works with commercial building owners and managers to provide tenants with a range of the state-of-the-art telecommunications services through its national broadband network.").

[20] GTE has argued that exclusive contracts between non-incumbent cable system operators (multichannel video programming distributors, or MVPDs) and building owners to provide video services to MTUs should not be prohibited at all. *See Telecommunications Services Inside Wiring*, 13 FCC Rcd 3659, 3750 (1997). This position is guided in large part because of the different legal authority for the regulation of telecommunications carriers under Title II and competitive MVPDs under Title VI. See e.g. GTE Ex Parte Presentation in CS Docket No. 95-184 (filed March 31, 1997).
(Continued...)

III. SECTION 251(C)(3) OF THE ACT, AS WELL AS TECHNICAL, ADMINISTRATIVE, AND NETWORK INTEGRITY CONCERNS, PRECLUDE THE UNBUNDLING OF INTRA-BUILDING WIRING AS A NETWORK ELEMENT.

The Commission seeks comment on the potential treatment of intra-building cable and wiring owned or controlled by an ILEC as an unbundled network element under Section 251(c)(3) of the Act.[21] As GTE explained in its comments in response to the *UNE Second Further NPRM*,[22] there is no legal or practical basis for the Commission to impose an ILEC unbundling requirement under Section 251(c)(3) upon facilities owned by the ILEC on the customer's side of the network demarcation point. Furthermore, a sub-loop unbundling requirement for ILEC-owned wiring on the carrier's side of the network demarcation point would be contrary to the Act, unnecessary, and would raise serious technical, administrative, and operational concerns.

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Notwithstanding, GTE's position in the Cable Wiring proceeding was driven largely because, as a new MVPD, it needed to be compensated for the up-front costs associated with wiring a building, an interest which could be protected by an exclusive contract. The compensation concern is addressed in GTE's proposal.

[21] *NPRM* at ¶ 51.

[22] Comments of GTE Service Corporation and Its Affiliated Domestic Telephone Operating Companies in Response to Second Further Notice of Proposed Rulemaking, 87-91 (filed May 26, 1999) ("*GTE UNE Remand Proceeding Comments*"), Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-170 (rel. Apr. 16, 1999) (Second Further Notice of Proposed Rulemaking) ("*UNE Second Further NPRM*").

Pursuant to footnote 123 of the *NPRM*, GTE hereby incorporates by reference its Comments and Reply Comments addressing the unbundling of intra-building cable and wiring in the *UNE Further NPRM* in this proceeding.

A. Intra-Building Wiring on the Customer's Side of the Demarcation Point is Not Part of the Loop, But Rather is Customer-Owned Wiring.

As an initial matter, facilities on the *customer's* side of the network demarcation point do not meet the definition of a "network element." The Commission has expressly stated" that the demarcation point is "the point at which the telephone company's facilities and responsibilities end and customer-controlled wiring begins."[23] Accordingly, the ILEC's network facilities end at the demarcation point, and any facilities on the customer's side of that point are not part of the ILEC network – and thus cannot be a network element.

Furthermore, even if inside wiring were a network element, it plainly does not meet Section 251(d)(2)'s "impair" test. Over 10 years ago the Commission detariffed inside wire in order to "foster competition in the inside wiring installation and maintenance markets, to promote new entry into those markets, . . . and to foster the development of an unregulated, competitive telecommunications marketplace."[24] These goals have been fully realized; today, the market for telephone inside wiring installation and maintenance is robustly competitive, and consumers have many choices among such providers. This competitive availability of inside wiring from third parties undermines any Section 251(d)(2) argument that "the failure to provide access to [inside wire] would impair the ability of the telecommunications carrier seeking access

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[23] *Review of Sections 68.104* and *68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, 12 FCC Rcd 11897, 11899 (1997) *("Demarcation Point Reconsideration Order").*

[24] *Detariffing the Installation and Maintenance of Inside Wiring*, 1 FCC Rcd 1190, (Continued...)

to provide the services that it seeks to offer."[25] Thus, the Commission lacks the statutory authority to require the unbundling of inside wire under Section 251.

Finally, even if there were the requisite legal authority, there is no practical basis upon which to require such unbundling. The Commission's decisions establishing a telephone network demarcation point and creating the right of customers to control access to the telephone plant on their side of the demarcation point – the so-called telephone "inside wiring" – make clear that ILECs may not use any interest in such wiring to "restrict the removal, replacement, rearrangement, or maintenance of inside wiring."[26] Accordingly, it is the individual customer – not the ILEC – that either owns or has the right to grant access to telephone inside wiring and other related facilities on the customer's side of the demarcation point.

B. Intra-Building Wiring on the Carrier's Side of the Demarcation Point Should Not be Unbundled as a UNE Because of the Technical, Administrative, and Operational Issues Associated with Sub-Loop Unbundling.

In the *UNE Second Further NPRM*, the Commission requested comment on whether, as a result of technological changes, it should require sub-loop unbundling at

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(...Continued)
1191 (1986) *("Detariffing Reconsideration Order")* (subsequent history omitted).

[25] 47 U.S.C. § 251(d)(2). Further confirming that inside wire does not meet the impair test, the Commission's rules already promote the competitively-neutral placement of the network demarcation point. *See, e.g., Modifications to the USOA System of Accounts*, CC Docket No. 82-261, 48 Fed. Reg. 50534 (1983) (complex wiring detariffing) (subsequent history omitted); *Detariffing Reconsideration Order*, 1 FCC Rcd at1190; *see also Report and Order*, 5 FCC Rcd. At 4686.

[26] *Demarcation Point Reconsideration Order*, 12 FCC Rcd at11903.

the remote terminal or at other points in the ILEC's network[27] – a requirement which, in the MTU context, would implicate carrier-owned intra-building wiring on the carrier's side of the demarcation point. As GTE stated in that proceeding, the FCC lacks the statutory authority to require such unbundling because it fails to meet Section 251(d)(2)'s "impair" standard.[28] Nevertheless, even if sub-loops did meet the Section 251(d)(2) "impair" standard, which they do not, sub-loop unbundling continues to raise complex technical, administrative, and operational issues which preclude practical consideration of such a requirement.

There are dozens of different loop configurations, each with a distinct combination of network elements and technologies. As a result, access at the sub-loop level must be evaluated on a case-by-case basis to determine whether access is feasible and whether the requesting carrier is willing to compensate the ILEC for the required work. Thus, the lack of a uniform sub-loop configuration – and the technical, administrative, and operational issues which thereby arise – render sub-loop unbundling entirely unsuitable for rules of nationwide applicability.

IV. SECTION 224 MAKES A SIMILARLY POOR STATUTORY CANDIDATE FOR ACCESS TO MTUs.

In light of the significant policy, legal, and constitutional issues raised by the application of Section 224 to MTUs, the statute makes a poor vehicle for addressing

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[27] *UNE Second Further NPRM*, CC Docket No. 96-98, FCC 99-70 (rel. Apr. 16, 1999).

[28] *See Comments of GTE Service Corp.* in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (filed May 26, 1999) (UNE Remand Proceeding).

intra-building wiring.[29] The Commission has properly recognized that "[t]he scope of a utility's ownership or control of an easement or right-of-way is a matter of state law" rendering the Commission unable to "structure general access requirements."[30] Reluctance to utilize Section 224 is also counseled by the potential takings law implications of any type of national right-of-way mandate.[31] "When faced with a constitutional challenge to a permanent physical occupation of real property, the Court has invariably found a taking that requires just compensation."[32] In fact, in rejecting one of the Commission's prior interpretations of Section 224, the D.C. Circuit held that takings authority may be implied only as a matter of necessity where "the grant [of authority] itself would be defeated unless [takings] were implied."[33] These state law and constitutional issues are particularly acute for private rights-of-way.[34] An expansion of

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29 As set out above, wire located on the customer's side of the demarcation point may be owned and controlled by the individual customer. Indeed in most cases building owners retain the right to exclude or terminate the relationship with the carrier. The right to exclude others has been described as "one of the essential sticks in the bundle of property rights." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979). Thus as a threshold matter, these MTU facilities cannot be classified as a pole attachment because such facilities and rights-of-way are not "owned or controlled" by the utility as required by Section 224(a)(4). See also Local Competition Order on Reconsideration, 11 FCC Rcd 15499, 15697 n. 853 (1996) (First Report and Order) ("Local Competition Order")

30 *Local Competition Order*, 11 FCC Rcd at 16082: *see also NPRM* at ¶ 47.

31 Indeed, many of the Commission's more aggressive proposed interpretations of Section 224 potentially run afoul of this constitutional provision. GTE explores these similarly unfirm proposals below.

32 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982).

33 *Bell Atlantic v. FCC*, 24 F.3d 1441, 1447 (D.C. Cir. 1994), *qouting Westerm Union Tel. Co. v. Pennsylvania R. Co.*, 120 F. 362, 372 (C.C.W.D. Pa., 1903).

34 By definition, private rights-of-way are contractual relationships between a utility

(Continued...)

these private agreements to grant access to additional parties, without a corresponding change in the terms of the private agreement, unfairly alters the fundamental nature of the bargain between the utility and the private land owner and should not be countenanced by the Commission.

If, despite these concerns, the Commission chooses to utilize Section 224 for MTUs, GTE demonstrates below that, under the statute: (1) access is limited to poles, ducts, conduits, and rights-of-way; (2) MTU wiring is not "conduit" under the Act; (3) property owned by the utility in fee simple is not a right-of-way; (4) access is permitted only if the utility is actually making use the property; (5) the scope of the right-of-way should be narrowly construed; and (6) mandated access is limited to wireline distribution facilities.[35]

A. Section 224 Does Not Grant Universal Access to All Utility Property, but Only Confers Access to Poles, Ducts, Conduits, and Rights-of-Way.

As set forth in GTE's prior pleadings to the Commission,[36] Section 224's scope is clearly restricted to "pole, duct, conduit, or right-of-way owned or controlled by a utility."

(...Continued)
and a private property owner for a particular and narrow purpose; *i.e.,* entry onto the land by particularly defined individuals. *See, e.g.*, 25 American Jurisprudence 2d at 576 (stating that "a private way relates to that class of easements in which a particular person or particular description or class of persons, as distinguished from the general public, has an interest or right") (citations omitted).

[35] In response to ¶ 48 of the *NPRM*, GTE believes that, once a state has pre-empted federal authority over pole attachments generally, there is no need for additional FCC certification regarding MTUs. *See generally* 47 C.F.R. § 1.1414 (regarding state certification). If, however, a state wishes to cede to the FCC solely MTU jurisdiction, it is GTE's recommendation that they do so through letter certification.

[36] *See* Opposition and Comments of GTE, In Implementation of the Local
(Continued...)

The statute is designed to provide access to potential bottleneck distribution facilities used for cable and wireline communications. It does not, and should not be interpreted to, create a blanket invitation for competitors to utilize any type of utility property, including rooftops, riser conduit, and microwave transmission facilities.[37] GTE fully supports the Commission's initial conclusion in the *Local Competition Order* that "[t]he intent of Congress in Section 224(f) was to permit cable operators and telecommunications carriers to 'piggyback' along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility."[38]

B. MTU Wiring is Not Conduit Under Section 224.

The Commission also cannot obtain jurisdiction over MTU wiring via the "conduit" language of Section 224. Congress long ago defined conduit as follows: "[d]uct or conduit systems consist of underground reinforced passages for electric and communications facilities as well as underground dips, lateral members, hand holes, splicing boxes, or pull boxes."[39] Moreover, the Commission itself has defined "conduit"

(...Continued)
Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 at 40-41 (filed October 31, 1996); Reply Comments of GTE, in Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98 at 17-24 (filed August 11, 1997).

37 *NPRM* at ¶ ¶ 38-40.

38 *Local Competition Order*, 11 FCC Rcd at 16084-85; although not expressly addressed in the *NPRM*, GTE also notes that the statute does not extend to airspace associated with various utility facilities.

39 Communications Act Amendments of 1978, Pub. L. No. 65-234, 1978 U.S.C.C.A.N. (92 Stat. 33) 109, 134.

as "a pipe placed in the ground in which cables and/or wires may be installed."[40] The Commission cannot stretch these long-accepted definitions to include MTU wiring.

C. Property Owned by the Utility is Not a Right-of-Way.

Both the traditional definition of "right-of-way" and the purposes of the Pole Attachment Act require that property owned by a utility in fee simple absolute not be subject to Section 224.[41] A right-of-way does not convey a fee interest in the land itself, but rather solely creates a right to pass over the underlying land.[42] A right-of-way is "an easement to pass or cross the lands *of another*."[43] Thus, it is contrary to the very definition of "right-of-way" to suggest that a utility can have a right-of-way over its own land.

The underlying purposes of the statute also support limiting Section 224 to actual rights-of-way. Section 224 is premised on the fact that incumbent providers have enjoyed historical advantages in working with local governments and through eminent

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40 47 C.F.R. § 1.1402(h)-(i).

41 NPRM at ¶ 43.

42 *See Great Northern Railroad Co. v. United States*, 315 U.S. 262, 279 (1942) ("Since petitioner's right of way is but an easement, it has no right to the underlying oil and minerals.").

43 28A C.J.S. *Easements* § 8 (1996) (emphasis added); even in the context of railroads, which the Commission has sought to classify as the "common use of the term," NPRM at ¶ 43 , the railroad company does not hold a fee interest in the land itself. In fact, courts have held that "[t]he term 'right-of-way,' in the context of railroad property interests, is a term of art signifying an interest in land which entitles the railroad to the exclusive use and occupancy in such land." *Idaho v. Oregon Short Line RailRoad Co.*, 617 F.Supp. 207, 210 (D. Idaho 1985). Thus, courts have refused to extend even the definition of a railroad right-of-way to include lands owned in fee simple absolute.

domain powers to obtain rights-of-way for their distribution networks. This traditional advantage in gaining access to potential bottleneck facilities was what Congress intended to mitigate with the Pole Attachment Act. In contrast, there is no evidence that the property that GTE owns is the product of any such historical or incumbent advantage. Other carriers are equally well-positioned to purchase property. Therefore, on the basis of both the underlying purposes of the Act and the definition of "right-of-way," the Commission should properly decline to extend the scope of the statute to include property owned in fee simple absolute.

D. The Utility Must Be Using the Underlying Right-of-Way.

Property should not be subject to Section 224 unless it is actually used as a wireline distribution facility.[44] The Commission speculates that third-party access rights should spring into being once a utility has received permission to place such a facility or takes other actions to secure such a right.[45] However the statute itself premises jurisdiction on whether facilities are "used" for "wire communications."[46] More practically, third-party access to unused rights-of-way also puts utilities in the awkward and burdensome position of negotiating access terms for a third party, supervising the third parties' deployment, interfacing with the property owner, and sundry other administrative tasks. Such an arrangement would also raise security and liability issues for the absent utility. Ultimately, the Commission should require some specific

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44 *See* NPRM at ¶ 45.

45 *Id.*

46 47 U.S.C. § 224(a).

and affirmative cessation of property rights by the owner and affirmative occupation by the utility prior to any third-party access.[47]

E. The Scope of the Right-of-Way Must Be Narrowly Construed.

In defining the extent of a right-of-way, the Commission should adopt a similarly restrained posture. If a utility uses all of the space available under the right-of-way, the third party should contact the property owner directly to obtain additional space. The utility is in no better position than the third party to obtain these rights, and insertion of the utility into this equation is burdensome and counterproductive. As the *Notice* recognizes, there are important distinctions between properties obtained by eminent domain and private property.[48] Accordingly, the rules regarding expansion of public rights-of-way should not be extended to impinge the private property rights set out above.

F. The Statute Does Not Extend to Exclusively Wireless Facilities.

Contrary to the suggestions in the *Notice*, the statutory language and legislative history of Section 224 strongly support its limitation to "poles, ducts, conduits, and rights-of-way used, in whole or in part, for wire communications."[49] While this language appears in Section 224's definition of "utility," it also properly informs the Commission's interpretation of the balance of the statute. As discussed above, Congress designed

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47 Winstar further contends that competitors should have a right to access utilities' properties even when they are not used as a distribution facility. NPRM at ¶ 45. As set out above, the purpose of the Pole Attachment Act was to grant access to bottleneck distribution facilities. The Commission should not stray from that essential purpose.

48 NPRM at ¶ 46.

49 47 U.S.C. § 224 (a)(1).

the statute to reach potential bottleneck facilities for telecommunications and cable wires. If Congress conceived of bottleneck facilities outside the wireline context, it would have drafted the statute to apply to all utilities, not just those that control pathways for "wire communications." Thus, microwave transmission facilities and rooftops used for wireless transmission are outside the scope of the statute. This restriction simply means that as a non-bottleneck facility, non-utility providers are equally well-situated to obtain these properties.[50] Finally, there is an extensive private market for transmit and receive antenna as well as other wireless placements. The availability of numerous market alternatives further undercuts any need to include those facilities within the scope of Section 224.[51]

In light of these significant limitations on the scope of Section 224, the Commission would be well advised to adopt an intra-building wire access rule without resorting to the invocation of the more invasive Section 224 approach.

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[50] The Commission is also aware that there are two appeals regarding the scope of Section 224 currently pending in the 11th Circuit. *See Gulf Power Co. v. FCC*, Case No. 98-6222 (11th Cir., 1998) (on appeal from the Commission's 1998 Order implementing Section 703(e) of the Act addressing the takings implications of Section 224's access requirements, the application of the statute to wireless providers, overlashing, dark fiber, and Internet communications); *Gulf Power Co. v. USA*, Case No. 98-2403 (11th Cir. , 1998) (an appeal from a district court order addressing whether compensation under Section 224 is Constitutionally sufficient).

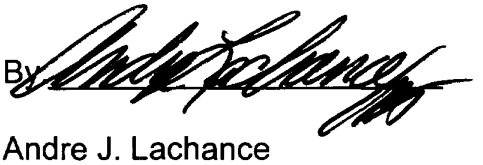
[51] GTE also wished to emphasize that the access rights set forth in the Notice pursuant to Section 224 (f) does not implicate rate regulation as set forth in other parts of the Act. The current regulations are woefully ill-equipped to deal with the plethora of ratemaking possibilities raised by the Notice. Wherever possible, the Commission under its new deregulatory framework should refrain from imposing detailed rate regulation where the marketplace is functioning adequately.

V. CONCLUSION

Accordingly, for all of the above reasons, the Commission should modify its existing inside wire rules to speed relocation of the demarcation point to the MPOE for MTUs in existence as of August 13, 1990. Such agency action will effectively promote facilities-based competition in the provision of telecommunications services by ensuring competitive access to MTUs.

Respectfully submitted,

GTE Service Corporation and its
Designated Affiliates

By: 

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CERTIFICATE OF SERVICE

I, Cheryl Hearn, hereby certify that on this 27th day of August, 1999, I caused copies of the foregoing "Comments of GTE" in WT Docket No. 99-217 and CC Docket No. 96-98 to be sent via hand-delivery to the following:

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